

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
August 25, 2008 Session

TIMOTHY BRESSLER v. H&H SPECIALTY COATINGS, INC.

**Direct Appeal from the Chancery Court for Madison County
No. 60723 James F. Butler, Chancellor**

No. W2007-02902-WC-R3-WC - Mailed February 3, 2009; Filed March 9, 2009

In this workers' compensation action, the trial court awarded benefits for a 70% permanent partial disability to the body as a whole for the combination of a lower back injury and a mental injury. The employer has appealed, contending that the trial court erred in awarding benefits for the mental injury and by relying upon the evaluating physician's impairment rating for the lower back injury. In the alternative, the employer contends that the award is excessive and that the trial court erred by finding that the employee did not have a meaningful return to work. We affirm the trial court's judgment.¹

**Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right;
Judgment of the Chancery Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which JANICE M. HOLDER, C. J., and DAVID HAYES, SR. J., joined.

Robert O. Binkley, Jr., James V. Thompson, Jackson, Tennessee, for the appellant, H&H Specialty Coatings, Inc.

Lewis L. Cobb, Sara E. Barnett, Jackson, Tennessee, for the appellee, Timothy Bressler.

¹This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Timothy Bressler worked as a supervisor in the Teflon department of H&H Specialty Coatings, a metal-coating facility. His job consisted primarily of spraying Teflon coating on large fifty-five to sixty-five pound metal plates and supervising one to three other employees engaged in the same activity. The metal plates had to be manually lifted from racks onto a table, coated, and then returned to the racks. The position of the plates in the racks varied from ground level to over head level. On September 17, 2002, Mr. Bressler reported to H&H that he had injured his right arm while handling one of the metal plates and that he was having pain in his lower back. Just prior to Mr. Bressler's injury, H&H reduced the number of its employees with those remaining having to do the same volume of work.

Mr. Bressler was referred to Dr. Jimmy K. Pratt, who placed him on restricted duty and prescribed medication. H&H offered a light-duty position to Mr. Bressler monitoring other employees in the Teflon department. Mr. Bressler reported to work for two days but then did not return. He testified that he was in great pain and had returned to Dr. Pratt. Dr. Pratt prescribed Tylenol with codeine, which Mr. Bressler testified made him drowsy. Mr. Bressler reported to H&H that he did not believe he could sit for eight hours because of the pain. He also related to them the medications he was taking and that he did not want to return to work and risk "falling out" at the job site. Ms. Bressler testified that, because of the medications, it would not have been safe for him to drive. H&H terminated Mr. Bressler on October 1, 2002, for failing to report to work.

Mr. Bressler received medical care from several doctors and was eventually referred to Dr. Michael Glover, an orthopaedic surgeon, in December 2002. Dr. Glover testified by deposition. He diagnosed Mr. Bressler as having degenerative disc disease in his lower back and carpal tunnel syndrome. Dr. Glover did not consider either of these conditions to be work-related and released Mr. Bressler on January 30, 2003. Dr. Glover assigned no impairment to Mr. Bressler and placed no restrictions upon his activities. Dr. Glover based his opinion upon his examination, an MRI study ordered by a previous physician, an EMG study performed by a previous physician, and a functional capacity evaluation that he ordered.

H&H's insurer was placed into liquidation shortly thereafter. As a result, Mr. Bressler received no medical treatment from January 2003 until late August 2003, although he continued to have pain in his back. During this gap, Mr. Bressler applied for and was accepted by TennCare, which paid for his remaining medical treatment.

In the latter part of 2003, Mr. Bressler sought treatment for mental and emotional difficulties. He was briefly hospitalized in December 2003 and again in December 2004 and in February 2006 with episodes of major depression. He also received outpatient treatment from a mental health center in his locality, including both medication and counseling. He was diagnosed with depression brought on by chronic pain syndrome and, on another occasion, with bipolar disorder.

Dr. Joseph Boals, an orthopaedic surgeon, conducted an independent medical evaluation at the request of Mr. Bressler's attorney. Dr. Boals testified that Mr. Bressler had a 10% impairment to the body as a whole due to a disc protrusion at the L5-S1 level. He also assigned a 10% impairment to the right arm due to carpal tunnel syndrome. Dr. Boals testified that Mr. Bressler's work could have caused his low back condition if the trial court found that Mr. Bressler was engaged in frequent heavy lifting during his employment.

Dr. Joel Reisman, a psychiatrist, performed an independent medical evaluation at the request of Mr. Bressler's attorney. His opinion was placed into the record by means of a C-32, Standard Form Medical Report for Industrial Injuries. H&H thereafter conducted a cross-examination deposition, as permitted by Tennessee Code Annotated section 50-6-235(c)(1999). Dr. Reisman's primary diagnosis was depression. His report, which was an exhibit to his deposition, states: "[Mr. Bressler] alleges that he has chronic pain, which causes disturbance in his sleep and activities and creates an inability to work. Because of this interference in functioning as well as his inability to support himself and his family and his worry about his future, he has developed a Mood Disorder." During cross-examination, he elaborated by saying "[When] you look at the documentation throughout all of the medical records, you see a consistent stressor of being unable to work and unable to engage in certain activities because of his pain . . . [So], that's why I think that – the work issue is a major stressor that is responsible for the depression." Dr. Reisman found that Mr. Bressler had a Class III² impairment according to the AMA Guides, which represents a moderate impairment of function.

Dr. John Griffin, also a psychiatrist, conducted an IME at the request of counsel for H&H. He agreed that Mr. Bressler had significant depression, and, like Dr. Reisman, assigned a Class III impairment. In addition, he found that Mr. Bressler had a personality disorder as a result of his unstable childhood. Dr. Griffin did not believe that Mr. Bressler's impairment or depression were caused by his work injury, although he did think that Mr. Bressler sincerely believed that event to be the cause of his mental condition. He believed that lack of income was Mr. Bressler's primary stressor. Mr. Bressler's impairment was, in his opinion, a result of that stressor, combined with his pre-existing personality disorder.

Mr. Bressler was forty-three years old at the time of trial. He attended school into the tenth grade and had no additional education. He testified that he had been in special education classes throughout his school years. He was able to sign his name, recognize letters of the alphabet, and perhaps perform simple arithmetic. However, he was not able to read or write. Prior to his job for H&H, he had been a factory worker, painter, and crane operator. His job for H&H included supervision of up to three other employees. He had not worked or applied for work since his injury occurred. He testified that he continued to have pain in his back and arm. The medical evidence indicated that he had developed a noticeable limp, apparently as a result of an ankle injury that was

²"[Class III] Impairment levels are compatible with some, but not all, useful functioning." American Medical Association, *Guides to the Evaluation of Permanent Impairment* 363, tbl. 14-1 (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2001).

unrelated to his employment. He had a history of intermittent substance abuse and had received medical treatment for depression a few years prior to his injury. That episode was related to the death of his mother.

The trial court found that Mr. Bressler had sustained a compensable injury to his lower back, with an impairment of 10% to the body as a whole. It further found that his depression was a compensable condition and that he had sustained a 20% impairment as a result. It determined that the evidence was not sufficient to conclude that his carpal tunnel syndrome was compensable. Mr. Bressler was awarded 70% permanent partial disability to the body as a whole. Judgment was entered accordingly.

H&H has appealed, contending that the trial court erred in several ways. First, H&H argues that the trial court erred by finding that Mr. Bressler suffered a compensable mental injury. Second, it contends that the trial court erred by basing its award, in part, upon Dr. Boals' impairment rating. H&H also asserts that the award is excessive and that the trial court erred by finding that Mr. Bressler did not have a meaningful return to work.

STANDARD OF REVIEW

The standard of review of issues of fact is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2007). When credibility and weight to be given testimony are involved, considerable deference is given the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

1. Mental Injury

The trial court found that Mr. Bressler's mental disorder was "causally related to his work injury," and was therefore compensable. H&H contends that the testimony of Dr. Griffin and to a lesser extent that of Dr. Reisman demonstrate that the primary cause of Mr. Bressler's psychological impairment is his lack of employment and income. Based upon that premise, H&H contends that application of Tennessee Code Annotated section 50-6-102(16) and Goodloe v. State of Tennessee,

36 S.W.3d 62, 65-66 (Tenn. 2001), require a finding that Mr. Bressler's condition is not compensable.

Tennessee Code Annotated section 50-6-102(16) provides:

“Mental injury” means a loss of mental faculties or a mental or behavioral disorder where the proximate cause is a compensable physical injury resulting in a permanent disability, or an identifiable work-related event resulting in a sudden or unusual mental stimulus. *A mental injury shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities[.]*

(Emphasis supplied).

It is undisputed that Mr. Bressler sustained a compensable physical injury. There is conflicting evidence regarding whether that injury caused a permanent physical disability. All of the evidence supports the conclusion that Mr. Bressler has a “mental or behavioral disorder.” Dr. Griffin, who testified for H&H, and Dr. Reisman, who testified on Mr. Bressler's behalf, stated that his mental disorder was caused, in whole or in part, by his inability to work. On those bases, H&H argues that the second sentence of section 50-6-102(16) excludes Mr. Bressler's mental disorder from the workers' compensation law.

Mr. Bressler contends that this argument is misplaced. He argues that the section provides for two types of compensable mental disorders: 1) an emotional injury arising from a physical injury, and 2) a mental injury arising from an emotional event at work. According to Mr. Bressler's argument, the second sentence of section 50-6-102(16) merely provides that loss of employment, a demotion or similar event will not satisfy the test of an emotional event causing a mental injury. Such an interpretation is consistent with the case law existing at the time the code section was enacted. See Goodloe, 36 S.W.3d at 67. H&H, on the other hand, argues that the additional language excludes recovery for the psychological consequences of loss of employment without regard to the nature of the stimulus which causes the injury. Section 50-6-102(16) was added to the workers' compensation statute on July 1, 2002 by Chapter 833, 2002 Public Acts, section 4. There are no published or unpublished decisions interpreting this section, nor is there a discussion of the purpose of the second sentence of the section in the legislative history.

The Tennessee Supreme Court has long recognized two factual situations in which employees may recover workers' compensation benefits for mental disorders. First, recovery has been allowed for a mental injury by accident or occupational disease, standing alone, if the mental disorder is “caused by an identifiable stressful, work-related event that produces a sudden mental stimulus such as fright, shock, or excessive unexpected anxiety.” Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 447 (Tenn. 1999); Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 488 (Tenn. 1997); Batson v. Cigna Prop. & Casualty Companies, 874 S.W.2d 566, 570 (Tenn. 1994). Second, compensation for psychological disorders has been allowed when an employee sustains a compensable work-related

injury by accident and thereafter experiences a mental disorder which is caused by the original compensable work-related injury. Batson, 874 S.W.2d at 570.

Tennessee Code Annotated section 50-6-116 provides that the workers' compensation statutes be construed by the courts so as to realize and attain the objects and purposes of those statutes. With that obligation in mind, we believe the second sentence of Tennessee Code Annotated section 50-6-102(16) should be interpreted to apply only when the loss of employment or employment opportunities is the sole basis for the mental injury. Such a construction not only is consistent with well established case law but is more in line with the purposes of the Workers' Compensation Laws than the construction urged by H&H.

We further note the references in the testimony of Dr. Reisman that Mr. Bressler's depression is caused by his chronic pain and its interference with his daily activities, including his ability to work. Dr. Griffin testified that the primary stressor in Mr. Bressler's life was his inability to earn an income. The trial court attributed Mr. Bressler's chronic pain to his work injury. The evidence does not preponderate against that conclusion. In such a circumstance, in our opinion, it would be impossible to determine the extent to which Mr. Bressler's mental condition was caused by his chronic pain or by his inability to work because of that chronic pain. In either case, it was caused by the physical injury he sustained at work. Based upon these factors, we conclude that the trial court did not err by awarding benefits for Mr. Bressler's mental injury in this case.

2. Impairment Rating

H&H contends that the trial court erred in using Dr. Boals' impairment rating for Mr. Bressler's back injury in arriving at its award. It notes that Dr. Boals' examination occurred more than three years after the alleged injury. In addition, Dr. Boals stated that he relied on radiology reports, some of which were inconclusive, rather than examining the actual films to conclude that Mr. Bressler had a herniated disc. One of those reports documents an MRI performed two years after the alleged injury and suggested that a change had occurred since previous studies. Finally, H&H points out that Dr. Boals testified his examination took thirty minutes or less. Based upon all of those factors, H&H contends that Dr. Boals' impairment rating was flawed and therefore did not provide an appropriate basis for determining disability.

Mr. Bressler responds that Dr. Boals' evaluation included a review of all medical records. He also notes that Dr. Boals' opinions were based upon statements made to him by Mr. Bressler, and argues that the trial court's decision expressly found him to be a credible witness. In light of that, he asserts that Dr. Boals' conclusions were based upon credible information. Mr. Bressler also notes that the treating physician, Dr. Glover, saw Mr. Bressler on only a few occasions during a six-week period. On that basis, Mr. Bressler asserts that Dr. Glover's opinion that Mr. Bressler had 0% impairment is of limited value.

Consistent with our obligation under Tennessee Code Annotated section 50-6-225(e), we have conducted an independent examination of the record to determine where the preponderance of

the evidence lies. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991). We note that an MRI taken November 12, 2002, shortly after the injury, showed a central disc extrusion at L5/S1. An MRI performed December 22, 2004, revealed a disc protrusion at L5/S1. A discogram dated April 13, 2005, indicated an annular tear at L5/S1. All three diagnostic tests evidenced a disc herniation upon which Dr. Boals based his impairment rating. Mr. Bressler consistently worked until September 17, 2002. He testified that he liked to work and worked all the overtime that he was offered. After September 17, 2002, he testified that he was in such pain that he was unable to work. The trial court expressly found Mr. Bressler to be a credible witness and from our review of the record that finding was appropriate. Dr. Boals' opinions appear to be more consistent than the testimony of Dr. Glover with regard to the facts of the case and Mr. Bressler's testimony concerning his condition during the time following his injury. Accordingly, we do not find that the evidence preponderates against the trial court's conclusion.

3. Excessive Award

H&H argues that the award of 70% permanent partial disability was excessive. It notes that much of the medical evidence indicates that Mr. Bressler's low back complaints were primarily the result of degenerative disc disease, and that most of the examinations of his low back have been within normal limits. In addition, H&H contends that the functional capacity examination ordered by Dr. Glover and the records of many other medical providers suggest that Mr. Bressler either did not give a full effort during his examination or demonstrated symptom magnification. Finally, H&H points out that neither Dr. Glover nor Dr. Boals assigned activity restrictions.

Mr. Bressler notes that he is unable to read and write and that his IQ is very low. His work experience includes some limited supervision but is nearly all in a factory or industrial setting. He testified that he had pain "every day of [his] life." Both Dr. Reisman and Dr. Griffin agreed that Mr. Bressler's psychiatric impairment significantly limited his ability to work. Dr. Griffin testified that his Global Assessment of Function diagnosis was 50 which, according to Dr. Reisman, is considered serious, "either serious symptoms and/or serious impairment in functioning." When Dr. Reisman considered both Mr. Bressler's physical and mental condition, he also placed Mr. Bressler's Global Assessment of Functioning in the serious range of 41 to 50.

The extent of vocational disability is a question of fact to be decided by the trial judge. Johnson v. Lojac Materials, 100 S.W.3d 201, 202 (Tenn. 2001). "In making determinations [of permanent disability], the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. § 50-6-241(a)(1)(1999). Mr. Bressler has sustained both physical and mental injuries. He has limited education and is functionally illiterate. His work experience is primarily unskilled. Taking these factors into consideration, we are unable to conclude that the evidence preponderates against the trial court's conclusion as to the extent of Mr. Bressler's disability.

4. *Meaningful Return to Work*

H&H contends that Mr. Bressler should be limited to a recovery of 2.5 times the impairment pursuant to Tennessee Code Annotated section 50-6-241(a)(1)(1999). It points out that Mr. Bressler was offered light duty work after his initial injury, but declined the opportunity. Citing Newton v. Scott Health Care Ctr., 914 S.W.2d 884, 886 (Tenn. Workers' Comp. Panel 1995), it argues that Mr. Bressler's failure to return to work was voluntary and unreasonable, and any award of benefits should be subject to the cap of 2.5 times the anatomical impairment.

Mr. Bressler testified that he believed that he was unable to work due to pain and the effects of the medication prescribed by his authorized physician. It is undisputed that his wife contacted H&H on several occasions to inform it that Mr. Bressler was unable to work because of the medications he was taking. Mr. Bressler was terminated only two weeks after his injury occurred. The trial court found that Mr. Bressler's "failure to return to work was justified because of the medications he was taking which prevented him from operating a vehicle and would have placed him in danger in working around the machinery he normally worked with." Our examination of the record as a whole leads us to the conclusion that the evidence does not preponderate against this finding.

CONCLUSION

The judgment is affirmed. Costs are taxed to the appellant, H&H Specialty Coatings, Inc., and its surety, for which execution may issue if necessary.

DONALD P. HARRIS, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
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**Chancery Court for Madison County
No. 60723**

No. W2007-02902-WC-R3-WC - Filed March 9, 2009

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, H&H Specialty Coatings, Inc., and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM